

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

APRIL'S HOUSEKEEPING
(Petitioner-Appellant)
HOGE FENTON JONES & APPEL INC

PRECEDENT
TAX DECISION
No. P-T-473
Case No. T-91-88

Employer Account No.

EMPLOYMENT DEVELOPMENT DEPARTMENT
(Respondent)

Office of Appeals No. C-T-34998

The petitioner, April's Housekeeping, appealed the decision by the administrative law judge which denied its petition for reassessment of an assessment levied under section 1126 of the Unemployment Insurance Code. The assessment covered the 27 month period between July 1, 1987 and September 30, 1989 and was for \$8,268.26 contributions, \$10,153.11 California personal income taxes and \$1,842.14 penalty, plus interest as provided by law.

Oral argument by the parties was heard on December 20, 1991. Written briefs by the parties and amicus were submitted and considered.

STATEMENT OF FACTS

Throughout the assessment period the petitioner operated a housekeeping service. Its owner placed newspaper ads to attract homeowners or businesses as customers. The ad stated that petitioner's business was licensed, bonded, and insured. When contacted by interested customers, the petitioner's owner told them its fixed hourly rate, which included its fee plus the hourly rate to be paid a housekeeper, and the minimum hours permitted. The petitioner would ascertain the type of services desired by the homeowner or business and the dates and times requested. The homeowner or business could request a one-time job or regularly scheduled service. The customers were instructed to pay for the service by delivering to the housekeeper a check made payable to the petitioner.

The petitioner's owner also placed newspaper ads to attract housekeepers. Those ads stated, "\$5.75 to start. Quick raises. No taxes/fees withheld. Need car and phone. . . ." When interested persons contacted the petitioner, each was instructed to complete an "Application for Employment". Petitioner's owner interviewed each person and had the applicant test-clean the owner's home. If the applicant's performance was satisfactory, the owner ascertained the dates and times of her availability, gave her a copy of the fee schedule, specifying the hourly rate to be paid, which increased as the hours worked for petitioner increased, distributed a copy of its work manual and its rules and regulations, and required each applicant to sign an independent contractor agreement. The housekeepers were directed to deliver the checks received from the homeowners at the time of service to the petitioner.

The fee charged to the homeowner and the hourly rate paid to the housekeeper were established by the petitioner without negotiation with either party.

The petitioner matched the services requested by the homeowners with the availability of the housekeepers and assigned the housekeepers their work. If a housekeeper could not make a previously scheduled assignment, she was to contact the petitioner, who would arrange for a substitute if the homeowner needed the service at the specified time. The petitioner handled all scheduling and assignment matters. While a housekeeper could refuse a particular assignment, the petitioner's rules required a housekeeper to work a minimum of 20 hours per week "to stay employed through April's". There was no contractual or other obligation for petitioner to assign any work or a particular amount of work to a housekeeper.

Each Friday the housekeepers were required to report to the petitioner's office. At that time they would deliver the checks received from the homeowners to the petitioner and the petitioner, in turn, would pay them by their hourly rate for the services they had performed. The petitioner would also give to them their known assignments for the next week.

The housekeepers were required to provide their own transportation.

Each housekeeper was free to work for clients other than those of the petitioner; however, few did so. There is no evidence that any of the housekeepers had a business license or a business office, or carried liability or property insurance in relation to their work.

Usually, the supplies and tools were provided by the homeowners. At times, a housekeeper would provide an item. The evidence is in conflict as to whether the petitioner would reimburse the housekeeper in this situation.

Usually, the homeowner would list the services requested of the housekeeper. When not done, or if not described in detail, the housekeeper was referred to the petitioner's manual which contained specific instructions regarding how to clean a home, including what cleaning items to bring, the order in which to clean rooms, the order in which to perform various cleaning services (e.g. top to bottom of room, dust first, etc.), the scope of the cleaning (e.g. in bathroom, spot clean walls, wash down cabinets under sink; in kitchen, shine appliances, get crumbs out of toasters, etc.), and preferred cleaning supplies (e.g. use Lysol tub/shower spray or Gel glass on tiles, dry and buff all areas with terry cloth towel, etc.).

The petitioner's rules and regulations, which each housekeeper was required to sign, provided, among other things, that the housekeeper call petitioner each day between 2 p.m. and 4 p.m. to receive assignments unless she was fully booked with regular clients; that the petitioner call the homeowner between 6 p.m. and 8 p.m. the evening before to confirm the assignment and receive directions; that the housekeeper call the petitioner for cancellations, illness, or if the homeowner did not deliver a check; that the housekeeper give the petitioner two weeks notice of a change in available hours or vacation time; that the housekeeper be responsible for the homeowner's property but give notice to petitioner if damage occurred; and that the petitioner could terminate the housekeeper if more than two clients refused to allow the housekeeper to provide regular service in their home.

The petitioner did not personally inspect the work of the housekeepers. However, when a housekeeper was first assigned, the petitioner would contact the customer to find out if the housekeeper's work was satisfactory. If a customer was not

satisfied with the work of a housekeeper, he or she would contact the petitioner with the complaint. The petitioner's owner offered to train the new housekeepers.

The independent contractor agreement provided that the petitioner would guarantee the payment for services by the housekeepers even if the homeowner did not pay. It was the petitioner's responsibility to collect the fees. The contract provided that it could be terminated at will by written notice of either party.

Acting upon an anonymous tip in 1987, a Department investigator interviewed the petitioner's owner. The investigator testified that he was told by the owner that the customers paid the housekeepers directly with checks payable to the housekeeper, and the housekeepers then paid to the petitioner a fee. In fact, approximately 95 percent of the customers paid for the services provided by writing checks payable to the petitioner, which included the hourly rate for the housekeeper and the petitioner's fee. Each Friday the petitioner paid the housekeepers their hourly rate for the services performed. Based upon the information provided by the petitioner's owner, the investigator expressed the opinion that the homeowners were the employers of the housekeepers. No further investigation or audit was conducted at that time, nor was any action requested of the Department by the petitioner.

REASONS FOR DECISION

Contributions are due the Department from employers with respect to wages paid in employment for unemployment insurance (section 976 of the Unemployment Insurance Code), disability insurance (section 984 of the code), and employment training (section 976.6 of the code). Employers are also required to withhold personal income tax from wages paid to employees and remit such withholdings to the Department (sections 13020 and 13021).

Section 1126 of the Unemployment Insurance Code provides that, if an employment unit fails to make a return required by law, the Department is authorized by section 1126 of the Unemployment Insurance Code to make an assessment of contributions estimated to be due and is required to add a penalty of ten percent to the amount of contributions that it computes and assesses.

Section 1129 of the Unemployment Insurance Code provides that the amount of the assessment under section 1126 of the code, exclusive of penalty, shall bear interest from the time that the contributions should have been paid until they are actually paid.

Section 13002 applies the provisions of sections 1126 and 1129 to an employer's failure to withhold and remit personal income tax to the department as required.

Section 601 of the Unemployment Insurance Code provides as follows:

"601. 'Employment' means service, including service in interstate commerce, performed by an employee for wages or under any contract of hire, written or oral, express or implied."

Section 621(b) of the Unemployment Insurance Code defines "employee" to include "Any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee."

In Empire Star Mines Co., Ltd. v. California Employment Commission (1946) 28 Cal.2d 33, the Supreme Court of California stated:

"In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, without cause. [Citations] Other factors to be taken into consideration are (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools and the place of work for the person doing the work; (e) the

length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. [Citation]"

A contractual provision that a workman is an independent contractor is persuasive evidence of the intended relationship, but it is not controlling and the legal relationship may be governed by the subsequent conduct of the parties (Brown v. Industrial Accident Commission (1917) 174 Cal. 457).

The fact that the parties may have mistakenly believed that they were entering into the relationship of principal and independent contractor is not conclusive (Max Grant v. Director of Benefit Payments (1977) 71 Cal.App.3d 647).

In determining whether an individual is an employee, as distinguished from an independent contractor, it is the existence of the right of control, not its use or lack of use, that is critical (Robinson v. George (1940) 16 Cal.2d 238).

Unskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost always a servant in spite of the fact that he may nominally contract to do a specified job for a specified price. Even where skill is required, if the occupation is one which ordinarily is considered an incident of the business establishment of the employer, there is an inference that the actor is a servant (Rest. 2d Agency, section 220, p.489).

A strong factor tending to show the relationship of employer and employee is the employer's right to terminate the work at will (Riskin v. Industrial Accident Commission (1943) 23 Cal.2d 248).

In analyzing the factors to be considered in determining whether an individual is an employee or an independent contractor, the American Law Institute's Restatement of Agency states that "it is for the triers of fact to determine whether or not there is a sufficient group of favorable factors to establish the relation." (Rest. 2d Agency, section 220, pp.486-487)

In this matter we find, for the reasons stated below, that the written contract signed by the housekeepers is not determinative of the nature of their relationship with the petitioner.

Both parties and amici have argued forcefully their respective positions as to the status of the housekeepers. We are persuaded by the weight of the evidence that the housekeepers were employees. The housekeepers were not engaged in an entrepreneurial venture or put at financial risk. Their pay was guaranteed by the petitioner, whether or not the customer paid. Moreover, the petitioner, without negotiation, determined the fee to be charged to the homeowners and the hourly rate to be paid to the housekeepers.

Equally as important, the housekeepers did not maintain control over their assignments or how they were to perform their assigned tasks. The petitioner determined what assignments, if any, to give to the housekeeper. If the housekeeper could not perform or complete a job for a customer, the housekeeper was required to notify the petitioner who arranged for a substitute. The housekeeper was given detailed instructions for the performance of her job by the customer or, if not, was required to follow the detailed instructions provided by the petitioner in its manual. The petitioner offered to train the housekeeper and exercised supervision over the housekeeper's performance by contacting homeowners for comment. If a housekeeper was not performing satisfactorily, the petitioner could train, reassign or terminate the housekeeper. Given all of these factors, we conclude that the housekeepers were employees, not independent contractors.

We next turn to the issue of whether the housekeepers were employees of the petitioner or of the homeowners.

Under sections 606.5(b) and 606.5(c) of the Unemployment Insurance Code, a "temporary services employer" is an employing unit that contracts with clients or customers to perform services for the client or customer and is the employer of the person hired to perform said services if it performs all the following functions:

- (1) Negotiates with clients or customers for such matters as time, place, type of work, working conditions, quality, and price of the services.

- (2) Determines assignments or reassignments of workers, even though workers retain the right to refuse specific assignments.
- (3) Retains the authority to assign or reassign a worker to other clients or customers when a worker is determined unacceptable by a specific client or customer.
- (4) Assigns or reassigns the worker to perform services for a client or customers.
- (5) Sets the rate of pay of the worker, whether or not through negotiation.
- (6) Pays the worker from its own account or accounts.
- (7) Retains the right to hire and terminate workers.

We find that the petitioner performs all the functions listed in section 606.5(b) and is, therefore, a temporary services employer. The petitioner negotiates with the customer for the time, place, and type of work and the price. It makes the assignments and reassignments. The petitioner sets the pay rate and pays the housekeepers from its own account. It hires the housekeepers and retains the absolute right to terminate them. Accordingly, the petitioner is the employer of the housekeepers.

An amicus brief urges that this case should be controlled by Avchen v. Kiddoo (1988) 200 Cal.App.3d 537, and that we should find the petitioner to be an agent of the housekeepers, not its employer. In Avchen, the court found that a nurses' registry was not the employer of nurses. In that case, however, the decision was grounded in sections of the Business and Professions Code which governed certain obligations of nurses' registries and defined them as "agents" of the nurses. That case, in our opinion, does not have application beyond nurses' registries. Nor are the facts comparable, as the petitioner herein functions in a manner vastly different than that of a registry of licensed professionals. Moreover, a specific statute controls in this situation, section 606.5 of the Unemployment Insurance Code, which defines temporary service employers, and we have found the petitioner to fit within that definition.

Finally, the petitioner argues that the Department should be estopped from collecting any taxes due to the conduct of one of the Department's employees in 1987.

In Precedent Decision P-B-115 the Appeals Board held that the Department cannot be estopped unless:

- (1) The Department, or its authorized representative, was apprised of all the facts;
- (2) The Department intended the party to rely on its conduct or statement, or led the party to believe he or she could rely on it;
- (3) The party was ignorant of the facts; and
- (4) The party relied on the Department, or its authorized representative's conduct or statement, to his or her injury.

The auditor's testimony that the petitioner informed him the homeowners made out checks payable to the housekeepers, which we credit, supports the conclusion that the first element required for estoppel was not met and that estoppel cannot be applied. Additionally, other elements required for estoppel were not met. In the cases cited by the petitioner regarding the collection of taxes where estoppel was supplied, the tax payer was faced with an agency rule or an express ruling regarding liability for taxes. In this case, there was no such formal agency action. No audit was completed, no ruling issued, no rule promulgated regarding the petitioner's enterprise. Finally, we find that it was not reasonable for the petitioner to rely upon the comment of one employee after only one conversation with the owner, particularly in light of its failure to provide complete and accurate information to the investigator and its failure to request any formal action by the Department. Taken together, this conduct does not create a situation sufficient to bar the collection of otherwise lawfully imposed taxes.

We conclude, therefore, that the doctrine of equitable estoppel cannot be applied in this case to prohibit the collection of taxes. Nor can the assessment of penalty and interest charges be barred.

Liability for penalty in regard to an assessment made under code section 1126 is mandatory. If the Department makes an assessment under that section, it must add a penalty of 10 percent to the amount of employer and worker contributions that it computes and assesses upon the basis of its estimate of the amount of wages paid for employment. Liability for the penalty, thus, stands or falls with the contribution liability itself.

The same is true of liability for interest under code section 1129. It automatically accrues on the contribution liability for each month, or fraction thereof, that payment is delayed from the time that the contributions should have been paid until they actually are paid. Again, liability for interest stands or falls with the contribution liability itself (Precedent Decisions P-T-30, P-T-105 and P-T-449).

DECISION

The decision of the administrative law judge is affirmed. The petition is denied.

Sacramento, California, July 14, 1992

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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FOR FURTHER APPEAL RIGHTS AND/OR
INFORMATION, SEE ATTACHED SHEET.

FOR FURTHER PROCEDURES AND RIGHTS

Under the provisions of the California Unemployment Insurance Code the Appeals Board is not permitted to reconsider its own decisions. A further review of the matter may be obtained after payment of the assessed liability by filing a claim for refund with the Director of the Employment Development Department. Such procedure is not automatic but must be initiated by the party seeking review.

Section 32, Article 13, California Constitution, provides as follows:

"No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid, with interest, in such manner as may be provided by the Legislature."

(See also section 1851 of the Unemployment Insurance Code and Modern Barber Colleges, Inc. v. California Employment Stabilization Commission (1948), 31 C. 2d 720)

In order to obtain further administrative review, the taxpayer must pay the assessment to the Employment Development Department and file with that Department a claim for refund.